No. 06-1221

In the Supreme Court of the United States

SPRINT/UNITED MANAGEMENT CO., PETITIONER

v.

ELLEN MENDELSOHN

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

The following two questions are subsumed within the question presented:

1. Whether a plaintiff employee claiming disparate treatment under the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.*, may be categorically barred from introducing evidence that other employees were subjected to age discrimination by a supervisor other than the supervisor who made the decision challenged by the plaintiff.

2. Whether the court of appeals erred in directing the admission of respondent's other-supervisor evidence, rather than remanding for a determination of admissibility under the correct legal standard.

TABLE OF CONTENTS

Page

Interest of the United States 1
Statement 1
Summary of argument 9
Argument:
In a case alleging disparate treatment under the ADEA, other-supervisor evidence is sometimes, but not always, admissible 13
A. Evidence is relevant in an ADEA disparate treatment case if it has "any tendency" to make more probable that age motivated the plaintiff's supervisor to take the challenged action 14
B. Other-supervisor evidence can be relevant in a number of circumstances 16
C. Relevant other-supervisor evidence may be excluded when its probative value is substantially outweighed by the danger of jury confusion or unfair prejudice 22
D. The district court abused its discretion in categorically excluding the other-supervisor evidence at issue here 24
E. The court of appeals erred in directing the district court to allow the other-supervisor witnesses to testify 26
Conclusion 30
Appendix 1a

TABLE OF AUTHORITIES

Cases: Page

Aramburu v. *Boeing Co.*, 112 F.3d 1398 (1997) 2
Burlington Indus., Inc. v. *Ellerth*, 524 U.S. 742 (1998) .. 15
Contemporary Mission, Inc. v. *Famous Music Corp.*, 557 F.2d 918 (2d Cir. 1977) 27
Cooper v. *Federal Reserve Bank*, 467 U.S. 867 (1984) ... 19
Crane v. *Kentucky*, 476 U.S. 683 (1986) 22
Desert Palace, Inc. v. *Costa*, 539 U.S. 90 (2003) 15
Gasperini v. *Center for Humanities, Inc.*, 518 U.S. 415 (1996) 26
Hamling v. *United States*, 418 U.S. 87 (1974) 24
Hazen Paper Co. v. *Biggins*, 507 U.S. 604 (1993) 1, 15
Huddleston v. *United States*, 485 U.S. 681 (1988) 21
International Bhd. of Teamsters v. *United States*, 431 U.S. 324 (1977) 18, 23
Keyes v. *School Dist. No. 1*, 413 U.S. 189 (1973) 16
Koon v. *United States*, 518 U.S. 81 (1996) 25
McDonnell Douglas Corp. v. *Green*, 411 U.S. 792 (1973) 10, 15, 18, 21
NLRB v. *Donnelly Garment Co.*, 330 U.S. 219 (1947) ... 24
Old Chief v. *United States*, 519 U.S. 172 (1997) 23, 24
Phillip Morris USA v. *Williams*, 127 S. Ct. 1057 (2007) 23
Pullman-Standard v. *Swint*, 456 U.S. 273 (1982) 12, 27
Reeves v. *Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000) 15
United States v. *Johnson*, 388 F.3d 96 (3d Cir. 2004) 27

Cases—Continued: Page

United States v. *McVeigh*, 153 F.3d 1166 (10th Cir. 1998), cert. denied, 526 U.S. 1007 (1999) 26
USPS v. *Aikens*, 460 U.S. 711 (1983) 15
Vincent v. *Louis Marx & Co.*, 874 F.2d 36 (1st Cir. 1989) 27
Wyvill v. *United Companies Life Ins. Co.*, 212 F.3d 296 (5th Cir. 2000), cert. denied, 531 U.S. 1145 (2001) 19

Statutes and rules:

Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.* 1
29 U.S.C. 623(a)(1) 1
29 U.S.C. 630(b) 15
Civil Rights Act of 1964, Tit. VII, 42 U.S.C. 2000e *et seq.* 13, 15
Fed. R. Evid.:
Rule 101 14
Rule 104(b) 21
Rule 401 ..... *passim*, 1a
Rule 402 ..... 14, 17
Rule 403 ..... *passim*, 1a
Rule 403 advisory committee's note 24

Miscellaneous: Page

2 John Henry Wigmore, *Evidence* (3d. ed. 1940) 16
2 *Weinstein's Federal Evidence* (Joseph M. McLaughlin ed., 2d ed. 2007) 14

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

This case presents the question whether and under what circumstances a plaintiff claiming disparate treatment under the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.*, may introduce evidence that other employees were subjected to age discrimination by a supervisor other than the supervisor who made the decision challenged by the plaintiff. The Equal Employment Opportunity Commission has authority under the ADEA to file suit against employers who have engaged in discrimination on the basis of age. The United States defends employment discrimination actions brought by federal employees under the ADEA. As a litigant on both sides of employment discrimination actions under the ADEA, the United States has a substantial interest in the resolution of the question presented in this case.

STATEMENT

1. The ADEA makes it "unlawful for an employer * * * to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. 623(a)(1). A plaintiff alleging disparate treatment in violation of the ADEA must show that age "actually motivated the employer's decision." *Hazen Paper Co.* v. *Biggins*, 507 U.S. 604, 610 (1993). To satisfy that burden, the plaintiff must show that age "actually played a role in that process and had a determinative influence on the outcome." *Ibid.*

2. a. In 2002, as part of an ongoing company-wide reduction-in-force (RIF), petitioner Sprint discharged respondent. Pet. App. 2a. At the time, respondent was 51 years of age and the oldest manager in her group. *Ibid.* Respondent filed suit in federal district court, alleging that Sprint terminated her because of her age, in violation of the ADEA. *Id.* at 1a.

Before trial, Sprint filed a motion in limine to exclude any evidence that Sprint has a pattern and practice or culture of age discrimination. Mot. in Limine 1; Mem. in Supp. of Mot. In Limine 1. In support of that request, Sprint argued that respondent was foreclosed from introducing such evidence because she was not asserting a pattern or practice claim. Mem. in Supp. of Mot. in Limine 1. Sprint also moved to exclude testimony that Sprint had discriminated against any other employee unless the allegedly discriminatory employment decision was made by the same supervisor who terminated respondent. Mot. in Limine 1; Mem. in Supp. of Mot. in Limine 1-2. In support of that request, Sprint argued that the Tenth Circuit's decision in *Aramburu* v. *Boeing Co.*, 112 F.3d 1398, 1404 (1997), categorically bars the introduction of such "other-supervisor" evidence. Mem. in Supp. of Mot. in Limine 2.

Respondent opposed Sprint's motion in limine. She argued that evidence that her employer discriminated against other employees in the same RIF is relevant to a finding that the asserted basis for terminating her as part of that RIF was pretextual, and that the relevance of such evidence did not depend on whether the employees shared the same supervisor as her. Mem. in Opp. to Mot. in Limine 1-4. Respondent also argued that a pattern or practice allegation is not a necessary precondi-

tion for the admission of such other-supervisor evidence. *Id.* at 4.

The district court granted Sprint's motion by a one-paragraph minute order. The order excludes any evidence that Sprint "has a pattern and practice, culture or history of age discrimination," and any testimony that Sprint discriminated against other employees unless respondent's supervisor "was the decision-maker in any adverse employment action." Pet. App. 24a. The district court did not explain the basis for its order.

b. Following that ruling, respondent submitted an offer of proof detailing evidence that she had intended to introduce concerning Sprint's discrimination against other employees. That offer of proof summarized the deposition testimony of five Sprint employees who were terminated in the same RIF as respondent by supervisors other than respondent's supervisor. All five of the employees were over 40 years of age and worked in a different work group than respondent. See Offer of Proof. 1-7.

According to the offer of proof, Bonnie Hoopes would have testified that, near the time she was terminated, her supervisor, Sharon Vorhies, told her that she was too old for the job. Offer of Proof 2. Hoopes would also have testified that Vorhies sent an email to her and four other Sprint employees reciting Jack Welch's philosophy that "A" employees are employees who "are blessed with lots of runway ahead of them." *Id.* at 2, Exh. A. Hoopes would have also testified that she was told that her job was being eliminated, when in fact other employees were doing her job. *Id.* at 2.

Yvonne Wood would have testified that she accidentally received a copy of a spreadsheet from a supervisor named Dan Kennedy entitled "layoffs" or "RIFs" that

indicated that age was considered in selection decisions. Offer of Proof 3. Wood would also have testified that Sprint hired young employees through a Staff Associate Program and put them on a fast track to management positions. *Ibid.* Wood would have further testified that one employee hired through that program was given training to do Wood's job. *Ibid.*

Sharon Miller would have testified that Sprint Manager Ted Stock frequently made derogatory remarks about older persons in her presence and that of other senior managers. Offer of Proof 4. Miller would have testified that Stock told her and other senior managers that he had too many older people in his department, and that he told her that he was waiting for layoffs so he could clean up his department. *Ibid.* Miller would also have testified that when she wanted to hire an older person into an open position, Stock told her that he wanted someone younger in that job. *Ibid.*

John Borel would have testified that he was told that he was terminated because his position was eliminated, not because of poor performance. Offer of Proof 5. When Borel applied for another position with Sprint, however, he was told that he had a poor performance rating in his file and therefore could not be hired. *Ibid.* Borel subsequently learned that another employee had been hired to fill his old position, contradicting the explanation he had been given for his termination. *Ibid.* When he contacted his ex-supervisor, Janet Mathus, she told him that while his performance was not a problem, she was forced to give him a low rating by Mohammad Hussain. *Id.* at 5-6.

John Hoopes would have testified that he was replaced by someone who lacked the qualifications for the job. Offer of Proof 6. While Hoopes was supposedly

terminated based on an Alpha rating, his supervisor did not even know his rating. *Ibid.* Hoopes would also have testified that when he wanted to hire someone over 40 years of age, he had to get his Vice President's approval. *Ibid.* After his termination, Hoopes often used Sprint's outplacement service to apply for open jobs at Sprint. *Id.* at 6-7. Hoopes never received a single offer despite his qualifications. *Id.* at 7. Hoopes also noticed that the vast majority of former Sprint employees who used the outplacement service were over the age of 40. *Ibid.*

c. During the course of trial, the district court reiterated its ruling that it would not allow respondent to introduce evidence that Sprint had discriminated against other employees unless the allegedly discriminatory decision was made by respondent's supervisor. Pet. App. 12a. The court also clarified that it would allow respondent to present evidence on whether Sprint followed its own procedures during the RIF, including spreadsheets containing the ages of certain Sprint employees considered for termination. *Id.* at 11a-12a. Following an eight-day trial, a jury returned a verdict in favor of Sprint. *Id.* at 4a.

3. In a 2-1 decision, the court of appeals reversed. Pet. App. 1a-23a. The court concluded that the other-employee evidence that respondent sought to introduce was "relevant to Sprint's [alleged] discriminatory animus toward older workers," and that the district court's categorical bar on the introduction of evidence that Sprint discriminated against other employees unless they shared respondent's supervisor had unfairly prevented respondent from making her case, and therefore constituted an abuse of discretion. *Id.* at 2a, 4a-5a; see *id.* at 14a-15a n.4.

The court of appeals noted that its prior decisions had allowed the introduction of evidence that the plaintiff's employer discriminated against other employees because a pattern of discrimination is circumstantial evidence that the employer acted with a discriminatory motive against the plaintiff. Pet. App. 6a. The court rejected Sprint's contention that respondent's failure to assert a pattern or practice claim foreclosed the introduction of such pattern or practice evidence, explaining that such evidence is also relevant to prove discrimination in an individual disparate treatment case. *Id.* at 6a n.2.

The court of appeals also rejected Sprint's argument that the district court's categorical bar on other-supervisor evidence was supported by its prior decision in *Aramburu*. Pet. App. 7a. The court explained that *Aramburu* held other-supervisor evidence inadmissible only in cases alleging discriminatory discipline. *Ibid.* The court held that *Aramburu*'s same-supervisor rule has no application where, as here, a plaintiff claims to be a victim of a company-wide discriminatory RIF. *Id.* at 9a. The court reasoned that applying the same-supervisor rule in that context would make it difficult, if not impossible, for a plaintiff to prove discrimination. *Ibid.* By relying on *Aramburu*, the court of appeals concluded, the district court had erred as a matter of law and therefore abused its discretion. *Id.* at 14a n.4.

The court of appeals then held that respondent's proffered testimony from other Sprint employees was relevant to respondent's claim of discriminatory treatment because it was "logically and reasonably tied" to the decision to terminate respondent. Pet. App. 9a. The court reasoned that, while the other employees did not share the same supervisor as respondent, all of the employees

were terminated within a year of respondent's termination as part of the same company-wide RIF, all of the employees were in the protected age group, and all of the employees were terminated based on similar criteria. *Id.* at 9a-10a.

The court of appeals rejected the argument that evidence that an employer discriminated against other employees is inadmissible unless the plaintiff has "independent evidence" that the employer has a company-wide policy of discriminating. Pet. App. 10a. The court explained that respondent had "proffered independent evidence in the form of testimony from other Sprint employees who were similarly treated during the RIF," and that such evidence is itself probative of a policy of discrimination. *Ibid.*

The court of appeals also concluded that respondent's proffered other-supervisor evidence, while not conclusive evidence that respondent was subjected to discrimination, was sufficient to "cause a reasonable trier of fact to raise an eyebrow, and proceed to assess the employer's explanation for its motive in terminating [respondent]." Pet. App. 14a (citation and internal quotation marks omitted). The court explained that "[a]ge as a motivation for Sprint's selection of [respondent] to the RIF becomes more probable when the fact-finder is allowed to consider evidence of (1) an atmosphere of age discrimination, and (2) Sprint's selection of other older employees to the RIF." *Ibid.* The court therefore concluded that respondent's proffered witnesses "should have been allowed to take the stand and testify subject, of course, to any district court ruling regarding the proper use and limitations of such testimony." *Id.* at 13a.

The court of appeals also held that respondent's other-supervisor evidence was not subject to exclusion under Rule 403 of the Federal Rules of Evidence. Pet. App. 15a. The court explained that while the admission of the evidence might require Sprint to defend against multiple claims of discrimination, that inconvenience to Sprint was insufficient to outweigh the probative value of respondent's other-supervisor evidence. *Ibid.* Thus, the court concluded, "[b]ased on the record before us, we cannot say the evidence is unduly prejudicial." *Id.* at 16a.

Judge Tymkovich dissented. Pet. App. 17a-23a. He agreed with the majority that "the district court's ruling is difficult to decipher, especially looking solely at the minute order." *Id.* at 17a. But he concluded that the decision whether to admit respondent's other-supervisor evidence constituted "a classic judgment call," and that while the district court "would not have erred" in admitting respondent's proffered evidence, "the court did not abuse its discretion in choosing to exclude it." *Id.* at 20a.

Judge Tymkovich concluded that respondent "had an adequate opportunity to introduce relevant evidence of Sprint's corporate policies and practices surrounding the RIF and argue that the RIF was itself a pretext for age discrimination." Pet. App. 19a. In addition, he viewed the proffered testimony as "a mixture of hearsay and speculation that would be marginally admissible in any event." *Ibid.* Accordingly, he concluded that it was not possible to "say that the court erred in excluding such testimony under the standards of Rule 403." *Ibid.*

Judge Tymkovich concluded that the "larger problem" with the majority's decision was that it suggested a per se rule that other-supervisor evidence is admissible in cases involving a RIF. Pet. App. 20a. Judge

Tymkovich also concluded that because Sprint is a large employer, evidence that five employees may have been subjected to discrimination "is not meaningful." *Ibid.* Judge Tymkovich also stated that he would exclude other-supervisor evidence unless there was independent evidence of a company policy of discrimination. *Id.* at 22a.

Finally, Judge Tymkovich concluded that if the majority were correct in holding that the district court excluded the other-supervisor evidence based on an erroneous legal standard, the court should have remanded for application of the proper legal rule rather than determining the admissibility of the evidence itself. Pet. App. 22a n.3. In his view, the majority's decision directing the admission of the other-supervisor evidence in this case, if not all cases involving RIFs, "runs counter to our traditional deference to district courts as the primary arbiters of admissibility." *Id.* at 23a.

SUMMARY OF ARGUMENT

Other-supervisor evidence is sometimes, but not always, admissible in an ADEA disparate treatment case.

A. The Federal Rules of Evidence establish a low threshold for relevancy. Under Rule 401, evidence is relevant if it has "any tendency" to make the plaintiff's claim more probable. A plaintiff alleging disparate treatment under the ADEA can prove that claim by showing that age motivated the supervisor delegated the authority to take the challenged action on behalf of the employer. Accordingly, evidence is relevant if it has any tendency to make more probable that age motivated that supervisor's decision.

B. Other-supervisor evidence may satisfy Rule 401's gateway threshold. Indeed, even a single act of discrim-

ination by another supervisor can satisfy that standard, such as where the evidence concretely suggests that a company-wide campaign is afoot. A pattern or practice of discrimination by other supervisors can also be relevant in proving that age motivated the plaintiff's supervisor, *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 804-805 (1973), such as when the pattern suggests that supervisors in the company as a whole, or within the geographic area or business unit in which the plaintiff's supervisor works, view age discrimination as a practice that the employer will tolerate.

Other-supervisor evidence, however, is not always relevant. For example, if an employee proffered testimony concerning alleged discrimination against her by a supervisor who had no relationship to the plaintiff or the plaintiff's supervisor, without anything reasonably to connect her experience to plaintiff's, the evidence would not be relevant. In addition, isolated or sporadic acts of discrimination do not, by themselves, create a relevant pattern of discrimination.

The plaintiff's theory of his case also bears on the relevancy determination. Other-supervisor evidence is more likely to be relevant when the plaintiff's theory is that his supervisor acted as a part of a company-wide "youth movement," than when the plaintiff's theory is that his supervisor simply had it out for him.

C. Relevant other-supervisor evidence is not automatically admissible. In particular, Rule 403 of the Federal Rules of Evidence allows a court to exclude other-supervisor evidence when its probative value is substantially outweighed by the danger of jury confusion, unfair prejudice, or undue delay. While that determination is necessarily record-intensive, certain guideposts are pertinent.

Relevant other-supervisor evidence can help the jury to understand why the plaintiff was treated the way that she was in a way that other evidence may not. In addition, because direct proof of a supervisor's discriminatory intent is often unavailable, other supervisor evidence can be important circumstantial evidence that age motivated the plaintiff's supervisor. At the same time, other-supervisor evidence always creates some risk that the jury will be distracted by disputes over whether other employees were subjected to discrimination, and some risk that the jury will make the mistake of thinking that just because one person was subjected to discrimination, the plaintiff must have been.

Based on such general considerations, when other-supervisor evidence has substantial probative force, its probative value generally would not be substantially outweighed by the risk of jury confusion and unfair prejudice. On the other hand, where other-supervisor evidence has only marginal probative value, Rule 403 concerns may well substantially outweigh the probative value of the evidence and justify a decision to exclude it.

D. The decision whether to admit or exclude evidence is largely left to the district court's discretion. A district court, however, necessarily abuses its discretion when it excludes evidence based on an incorrect legal standard. The court of appeals properly concluded that the district court in this case committed such a legal error when it excluded respondent's evidence based on a categorical rule that other-supervisor evidence is per se inadmissible.

E. The court of appeals nonetheless erred in ordering the district court to admit respondent's other-supervisor evidence. When an appellate court determines that a district court has excluded evidence based on an incor-

rect legal standard, it should remand to the district court for a determination under the correct legal standard, unless the record permits only one possible resolution of the issue. Cf. *Pullman-Standard* v. *Swint*, 456 U.S. 273, 292 (1982).

To the extent that the court of appeals concluded that the exclusion of the respondent's evidence necessarily would constitute an abuse of discretion, it did so based on an incorrect legal standard. The court reasoned that other-supervisor evidence is necessarily admissible whenever the other employees were terminated in the same RIF, were in the protected class, and were subject to the same procedures. But not all evidence falling within that broad category is necessarily relevant. Still less would a district court be required to conclude that all such evidence has probative force that would not be substantially outweighed by the risk of jury confusion, unfair prejudice, or undue delay. Accordingly, rather than resolving the issue itself, the court of appeals should have remanded to the district court to determine the admissibility of respondent's other-supervisor evidence under the correct legal standard.

Rather than engaging in a record-intensive de novo review of the court of appeals' own (de novo) Rule 401 and 403 determinations, this Court should answer the question presented by holding that other-supervisor evidence is sometimes, but not always, admissible to prove disparate treatment under the ADEA; it should provide some general guidance on when it would and would not be admissible; and it should direct that the case be sent back to the district court for a determination of admissibility under the correct legal standards.

ARGUMENT

IN A CASE ALLEGING DISPARATE TREATMENT UNDER THE ADEA, OTHER-SUPERVISOR EVIDENCE IS SOMETIMES, BUT NOT ALWAYS, ADMISSIBLE

This case involves the admissibility of "other-supervisor evidence"—evidence that other employees of the plaintiff's employer were subjected to discrimination by a supervisor other than the supervisor who made the decision challenged by the plaintiff. When a plaintiff brings a disparate treatment claim under the ADEA, other-supervisor evidence is sometimes, but not always, admissible. Because the district court *categorically* barred the introduction of other-supervisor evidence, it abused its discretion by applying an erroneous legal standard. The court of appeals, however, went too far in the other direction when it required the admission of respondent's other-supervisor evidence. After determining that the district court excluded the evidence based on an incorrect legal standard, the court of appeals should have remanded to the district court to determine the admissibility of respondent's other-supervisor evidence under the correct legal standard.[1]

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[1] Petitioner refers to the question as involving the admissibility of "me, too" evidence. Because "me, too" evidence would include evidence relating to acts of the same supervisor who made the decision challenged by the plaintiff, and may not capture the essence of the evidence in any event, this brief uses the term "other-supervisor" evidence to describe the evidence at issue. In this case, the question whether other-supervisor evidence is admissible arises in the context of a claim of disparate treatment under the ADEA. But the same basic standards that govern the admissibility of such evidence under the ADEA would apply under other statutes that forbid disparate treatment, such as Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*

A. Evidence Is Relevant In An ADEA Disparate Treatment Case If It Has "Any Tendency" To Make More Probable That Age Motivated The Plaintiff's Supervisor To Take The Challenged Action

1. Like all litigation in the federal courts, the admissibility of evidence in ADEA cases is governed by the Federal Rules of Evidence. See Fed. R. Evid. 101. Under Rule 402, all relevant evidence is admissible, except as otherwise provided by the Constitution, Acts of Congress, other Federal Rules, or rules prescribed by this Court. Evidence that is not relevant, by contrast, is inadmissible. Rule 401 defines relevant evidence in broadly encompassing language as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401.

By making evidence relevant when it has "any tendency" to make a consequential fact "more probable or less probable than it would be without the evidence," Rule 401 sets a purposely low gateway threshold for the introduction of evidence. Under that standard, "[e]vidence need not prove conclusively the proposition for which it is offered, nor make that proposition appear more probable than not." 2 *Weinstein's Federal Evidence* § 401.04[2][b], at 401-21 (Joseph M. McLaughlin ed., 2d ed. 2007). Instead, the sole question "is whether a reasonable person might believe the probability of the truth of the consequential fact to be different if that person knew of the proffered evidence." *Ibid.* That standard may be satisfied even if the evidence "only slightly affects the trier's assessment of the probability of the matter to be proved." *Id.* § 401.04[2][c][ii], at 410-25.

Rule 401 thus establishes a low threshold for determining what evidence is relevant, and thus potentially admissible, in federal cases. The Federal Rules of Evidence establish other limitations—including Rule 403, discussed below—on the admission of relevant evidence that passes Rule 401's relatively undemanding gateway threshold.

2. The key consequential fact that a plaintiff claiming disparate treatment in violation of the ADEA must prove is that age "actually motivated the employer's decision." *Hazen Paper Co.* v. *Biggins*, 507 U.S. 604, 610 (1993). Because the ADEA, like Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, generally incorporates common law agency principles, see 29 U.S.C. 630(b), a plaintiff can satisfy that burden by showing that age motivated the supervisor delegated the authority to take the challenged action on behalf of the employer. See *Burlington Indus., Inc.* v. *Ellerth*, 524 U.S. 742, 760-763 (1998). Evidence is therefore relevant in an ADEA disparate treatment case if it has "any tendency" to make more probable that age motivated that supervisor's decision.

Like Title VII, the ADEA, does not restrict the categories of evidence that a plaintiff may introduce to prove that a supervisor acted with an improper motive. And this Court has repeatedly held that a plaintiff alleging disparate treatment may rely on any direct or circumstantial evidence, including evidence that the stated reason for the employer's decision is pretextual. *Desert Palace, Inc.* v. *Costa*, 539 U.S. 90, 99 (2003); *Reeves* v. *Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147 (2000); *USPS* v. *Aikens*, 460 U.S. 711, 714 n.3, 716 (1983); *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 804-805 (1973).

B. Other-Supervisor Evidence Can Be Relevant In A Number Of Circumstances

1. One category of circumstantial evidence that makes it more probable that age motivated the plaintiff's supervisor in making the decision challenged by the plaintiff is evidence that age motivated the *same* supervisor to engage in acts of discrimination against other employees. The admission of such evidence "is merely an application of the well-settled evidentiary principle that 'the prior doing of other similar acts, whether clearly part of a scheme or not, is useful as reducing the possibility that the act in question was done with innocent intent.'" *Keyes* v. *School Dist. No. 1*, 413 U.S. 189, 207 (1973) (quoting 2 John Henry Wigmore, *Evidence* 200 (3d ed. 1940)).

2. That does not mean, however, that only acts of discrimination committed by the same supervisor are relevant. When the plaintiff can produce evidence that other supervisors have engaged in acts motivated by an employee's age, it may, in some circumstances, also tend to suggest that the plaintiff's supervisor acted with the same motive, and therefore satisfy Rule 401's threshold.

For example, if a supervisor other than the plaintiff's supervisor dismissed an employee at the same time as the plaintiff was dismissed and told the employee that he was dismissing him "because the company is on a youth campaign," a jury could reasonably draw an inference that the supervisor who dismissed the plaintiff was responding to the same company-wide youth campaign. That evidence does not conclusively prove that the plaintiff's supervisor was motivated by age. But since a reasonable factfinder could conclude that evidence of a company-wide youth movement increases the probabil-

ity that age motivated the plaintiff's supervisor, it satisfies Rule 401's inclusive relevancy standard.

Similarly, Rule 401's relevancy standard would also be satisfied by evidence that the manager to whom the plaintiff's supervisor reports terminated an employee the month before the plaintiff's termination and communicated to the plaintiff's supervisor that his decision was based on age. Because experience suggests that supervisors often take their cues on what actions they may take from the manager to whom they report, a reasonable factfinder might regard that evidence as increasing the likelihood that the plaintiff's supervisor discriminated on the basis of age.

Likewise, if a supervisor who terminated another older worker gave the same distinctive explanation for the decision that the plaintiff's supervisor gave for the decision to terminate the plaintiff, and the evidence showed that the other supervisor's explanation was pretextual, such evidence might suggest to a reasonable factfinder that the two supervisors shared information on how to cover up discrimination. A reasonable factfinder could also regard the similarity in explanations as a coincidence, but the evidence is sufficiently suggestive of the possibility that the two supervisors coordinated their discriminatory acts to satisfy Rule 401's relevance standard.

As those examples illustrate, evidence of a single act of discrimination by a different supervisor can satisfy Rule 401's relevancy standard. Rules 401 and 402 do not categorically bar the admission of such evidence. By the same token, Rules 401 and 402 do not categorically require the admission of other-supervisor evidence. If the plaintiff fails to articulate a reasonable basis for concluding that other-supervisor evidence would make dis-

crimination against the plaintiff more likely, such evidence may be properly excluded.

For example, if an employee who worked for another supervisor in another part of a corporation were to provide testimony relating to her own experience of perceived discrimination by a supervisor who had no relationship to the plaintiff or her supervisors, without anything reasonably to connect that experience to the plaintiff's experience, the evidence would not be relevant, because it would shed no light on the motives of the plaintiff's supervisor. Standing alone, such anecdotal testimony involving an unrelated supervisor is not relevant to a plaintiff's case because it does not provide a reasonable basis for a factfinder to conclude that the plaintiff's claim of discrimination is more likely.

3. Another category of other-supervisor evidence that can be relevant in establishing that age motivated the plaintiff's supervisor is evidence of a pattern or practice of discrimination by other supervisors. *McDonnell Douglas*, 411 U.S. at 804-805. Indeed, where a plaintiff can show that a pattern of age discrimination is so widespread as to be the employer's standard operating procedure, such evidence is more than merely relevant. In that circumstance, "[t]he proof of the pattern or practice supports an inference that any particular employment decision, during the period in which the discriminatory policy was in force, was made in pursuit of that policy," shifting the burden to the employer "to demonstrate that the individual [claiming discrimination] was denied an employment opportunity for lawful reasons." *International Bhd. of Teamsters* v. *United States*, 431 U.S. 324, 362 (1977).

Other-supervisor evidence may often fall short of proving that discrimination is an employer's standard

operating procedure. For example, "isolated or sporadic" examples of alleged discrimination are not sufficient, by themselves, to create an inference that discrimination is an employer's standard operating procedure. *Cooper* v. *Federal Reserve Bank*, 467 U.S. 867, 875-876 (1984). See *Wyvill* v. *United Companies Life Ins. Co.*, 21 F.3d 296, 302 (5th Cir. 2000) ("A 'pattern or practice' of discrimination does not consist of 'isolated or sporadic discriminatory acts by the employer.'") (quoting *Cooper*, 467 U.S. at 875-876), cert. denied, 531 U.S. 1145 (2001).

In order to be relevant, however, a pattern of discrimination against members of a protected group need not be so widespread and systematic as to support an inference that discrimination is the employer's standard operating procedure and that each individual denied an employment opportunity who is a member of the group is more likely than not a victim of discrimination. Like other circumstantial evidence, a pattern of discrimination is relevant if it makes it more probable that the plaintiff is a victim of discrimination, even if the increase in probability is not great.

That standard can be satisfied when a reasonable factfinder could view the pattern of age discrimination as suggesting not that age discrimination is the employer's standard operating procedure, but that supervisors view age discrimination as a practice that the employer will tolerate. When the pattern of age discrimination indicates that supervisors within the company as a whole, or within a geographic area or business unit of the company in which the plaintiff's supervisor works, view age discrimination as an acceptable option, it increases the probability that age motivated the plaintiff's supervisor in taking the action challenged by the plaintiff.

In determining whether a pattern of discrimination is sufficient to create that inference, a number of factors may be pertinent. They include: the number of supervisors who have allegedly engaged in discrimination, the size of the employer, the frequency of the alleged discrimination, whether the discrimination has occurred in a geographic area or business unit in which the plaintiff's supervisor works, whether the discrimination is practiced openly, whether notice of the discrimination has reached high-level managers of the employer, and whether the discrimination has occurred reasonably close in time to the time of the act challenged by the plaintiff.

Thus, when the evidence shows that a significant number of supervisors in the business unit in which the plaintiff's supervisor works openly practiced discrimination within months of the action challenged by the plaintiff, and that high-level managers were aware of it, Rule 401's relevancy standard would be satisfied. On the other hand, where the evidence shows that two supervisors in a separate business unit in a different geographic area engaged in discrimination many months or years ago and no high-level manager was aware of it, the evidence would not satisfy Rule 401's relevancy standard. In between those examples are numerous permutations in which pattern or practice evidence would sometimes be relevant, sometimes be irrelevant, and sometimes require a judgment call by the district court.

For purposes of determining whether other-supervisor evidence adds up to a relevant pattern or practice, it makes no difference whether a plaintiff is asserting an individual claim or a pattern or practice claim. The force of the evidence in tending to establish that an individual has suffered discrimination is the same in either

event. Indeed, in *McDonnell Douglas*, 411 U.S. at 804-805, the Court expressly indicated that pattern or practice evidence can be relevant in an individual case in showing that the employer's explanation for adversely treating the plaintiff is pretextual. On the other hand, the plaintiff's own theory of discrimination may affect the relevance of other-supervisor evidence. If the plaintiff's theory is that his or her immediate supervisor responded to a company-wide policy favoring youth, other-supervisor evidence is more likely to be admissible, all else being equal, than if the plaintiff's theory is that his or her supervisor engaged in an isolated discriminatory act.

The Federal Rules of Evidence do not contain any requirement that a plaintiff introduce evidence that is independent of the other-supervisor evidence in order to make that evidence relevant. An adequate foundation is laid under Rule 104(b) of the Federal Rules of Evidence when plaintiff's other-supervisor evidence as a whole (together with whatever other evidence the plaintiff proffers) could lead a reasonable factfinder to conclude that discrimination is the employer's standard operating procedure or that supervisors in the company as a whole, or in the geographic area or business unit in which plaintiff's supervisor works, view discrimination as an acceptable option that the employer will tolerate. Cf. *Huddleston* v. *United States*, 485 U.S. 681, 689-690 (1988). If such a foundation is laid, a reasonable factfinder could conclude that the pattern or practice evidence makes more probable that the plaintiff's supervisor was motivated by age. For purposes of assessing the

relevance of other-supervisor evidence, that is all that the Federal Rules of Evidence require.[2]

C. Relevant Other-Supervisor Evidence May Be Excluded When Its Probative Value Is Substantially Outweighed By The Danger Of Jury Confusion Or Unfair Prejudice

Even when evidence is relevant, it is not automatically admissible. Rule 403 of the Federal Rules of Evidence allows a court to exclude relevant evidence when its probative value is substantially outweighed by other considerations, such as the danger of jury confusion, unfair prejudice, or undue delay. Determining whether relevant other-supervisor evidence should be excluded under Rule 403 is necessarily a record-intensive inquiry, and trial courts traditionally have "wide latitude to exclude evidence that is * * * only marginally relevant or poses an undue risk of prejudice * * * or confusion of the issues." *Crane* v. *Kentucky*, 476 U.S. 683, 689-690 (1986) (citation and internal quotation marks omitted). In undertaking that inquiry, however, several general guideposts are pertinent.

For example, other-supervisor evidence can have persuasive force—and thus probative value—that other evidence lacks. In *Teamsters*, the Court emphasized that the government's evidence that individuals who testified about their personal experiences with the company brought the "cold numbers" supporting the govern-

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[2] Once an adequate foundation has been laid for the admission of pattern or practice evidence, an individual piece of other-supervisor evidence would be relevant if it makes more probable either that discrimination is the employer's standard operating procedure or that supervisors in the company as a whole, or in the geographic area or business unit in which the plaintiff's supervisor works, viewed discrimination as an acceptable option.

ment's pattern or practice claim "convincingly to life." 431 U.S. at 339. Other-supervisor evidence can have a similar impact in an individual case. When other-supervisor evidence is relevant in establishing that age motivated the plaintiff's supervisor, it can help the jury to understand why the plaintiff was treated the way that she was in a way that other evidence may not. In addition, because direct proof of a supervisor's discriminatory intent is often unavailable, other supervisor evidence can be important circumstantial evidence in establishing discriminatory intent.

At the same time, other-supervisor evidence always creates some risk that the jury will be distracted by disputes over whether *other* employees were subjected to discrimination and therefore fail to focus sufficiently on the question whether the plaintiff was a victim of discrimination. Other-supervisor evidence also always creates some risk that the jury will make the mistake of thinking that just because one person was subjected to discrimination, the plaintiff must have been, or still worse, that the employer should be punished for an act of discrimination against someone other than the plaintiff even when the plaintiff has not been subjected to discrimination. Cf. *Old Chief* v. *United States*, 519 U.S. 172, 180-181 (1997); see also *Phillip Morris USA* v. *Williams*, 127 S. Ct. 1057, 1064 (2007) (noting "risks of unfairness" in jury consideration of injury to third parties). In addition, particularly egregious examples of discrimination can inflame jurors' passions and heighten these risks of jury confusion or prejudice.

In general, when other-supervisor evidence has substantial probative force, generalized concerns of jury confusion and unfair prejudice ordinarily do not outweigh, much less *substantially* outweigh, the probative

value of the other-supervisor evidence and therefore do not justify the exclusion of the evidence under Rule 403. In that circumstance, concerns relating to jury confusion and unfair prejudice ordinarily may be addressed with appropriate jury instructions. See Fed. R. Evid. 403 advisory committee's note. On the other hand, where the other-supervisor evidence has only marginal probative value, the balance changes. In that circumstance, concerns about jury confusion and unfair prejudice may well substantially outweigh the probative value of the evidence and justify a decision to exclude it. Cf. *Old Chief*, 519 U.S. at 191. Here, too, the plaintiff's theory of the case and the extent to which he or she relies on company-wide incentives or idiosyncratic behavior can affect the district court's balancing. As in other contexts, district courts—as the "primary arbiters of admissibility" (Pet. App. 23a)—have discretion to conduct the Rule 403 balancing taking account of those general considerations, and the particular facts and circumstances of the cases before them.

D. The District Court Abused Its Discretion In Categorically Excluding The Other-Supervisor Evidence At Issue Here

A district court ruling on the relevance of evidence is subject to review under an abuse of discretion standard. *Hamling* v. *United States*, 418 U.S. 87, 124-125 (1974). Similarly, rulings under Rule 403 are subject to review under an abuse of discretion standard. *Old Chief*, 519 U.S. at 183 n.7. Under an abuse of discretion standard, the decision whether to admit or exclude evidence is largely left to the district court's discretion. *Hamling*, 418 U.S. at 125; *NLRB* v. *Donnelly Garment Co.*, 330 U.S. 219, 236 (1947). At the same time, however, when a court excludes evidence based on an incorrect legal

standard, it necessarily abuses its discretion. See *Koon* v. *United States*, 518 U.S. 81, 100 (1996).

The district court in this case committed legal error—and therefore abused its discretion—when it excluded the proffered other-supervisor evidence. The district court did not explain the basis of its ruling. But the most plausible explanation for its ruling is that it concluded that other-supervisor evidence is per se inadmissible in an individual case alleging disparate treatment (as opposed to a pattern or practice). That is how the court of appeals construed the order. See Pet. App. 3a, 14a n.4. That was the only basis on which petitioner sought exclusion of the evidence, the district court defined the category of *admissible* evidence as proof that respondent's supervisor "was the decision-maker in any adverse employment action," *id.* at 24a, and there is nothing else in the course of the proceedings to suggest that the district court excluded the evidence on any other basis.

For the reasons previously discussed, other-supervisor evidence is not per se inadmissible in an individual disparate treatment case under the ADEA; it sometimes makes it more probable that age motivated the plaintiff's supervisor; and its probative value is not always substantially outweighed by the factors set forth in Rule 403. Because the district court excluded respondent's other-supervisor evidence based on an incorrect legal standard, the court of appeals properly held that the district court abused its discretion in excluding the proffered evidence. Pet. App. 5a.

E. The Court Of Appeals Erred In Directing The District Court To Allow The Other-Supervisor Witnesses To Testify

After the court of appeals concluded that the district court used an incorrect legal standard in excluding respondent's other-supervisor evidence, it did not remand to the district court so that it could consider the admissibility of the evidence under the correct standard. Instead, the court of appeals determined for itself that respondent's witnesses should be allowed to testify. Pet. App. 13a. In following that course, rather than remanding to the district court, the court of appeals erred.

1. The court of appeals did not clearly articulate its rationale for resolving the issue of admissibility itself rather than remanding to the district court for a determination under the correct legal standard. But parts of the court of appeals' opinion suggest that it believed that once an appellate court sets aside a district court's ruling because it is based on an incorrect legal standard, the appellate court is then free to decide independently whether the evidence is relevant, and if so, whether its probative value is substantially outweighed by the considerations in Rule 403. Pet. App. 9a-10a (relevance); *id.* at 15a (Rule 403). That reading of the decision is consistent with prior Tenth Circuit precedent holding that the court of appeals may engage in de novo balancing under Rule 403. *United States* v. *McVeigh*, 153 F.3d 1166, 1189 (10th Cir. 1998), cert. denied, 526 U.S. 1007 (1999).

When a district court applies an incorrect legal standard in an area in which that court has discretion, an appellate court should ordinarily remand for a determination under the correct legal standard rather than resolve the issue itself. *Gasperini* v. *Center for Humanities, Inc.*, 518 U.S. 415, 438-439 (1996); *Vincent* v. *Louis*

Marx & Co., 874 F.2d 36, 41 (1st Cir. 1989); *Contemporary Mission, Inc.* v. *Famous Music Corp.*, 557 F.2d 918, 928 (2d Cir. 1977); see *United States* v. *Johnson*, 388 F.3d 96, 101-103 (3d Cir. 2004); cf. *Pullman-Standard* v. *Swint*, 456 U.S. 273, 292 (1982). There is an exception to that rule when the record permits only one possible resolution of the question. Cf. *Pullman-Standard*, 456 U.S. at 292. In that circumstance, a remand would be nothing more than a wasteful exercise. But where the record would permit a district court to exercise its discretion in either direction, the court of appeals must remand to allow the district court to make that judgment call. It may not usurp the district court's function by making a de novo determination of the issue itself. *Vincent*, 874 F.2d at 41; cf. *Pullman-Standard*, 456 U.S. at 292. To the extent the court of appeals sought to exercise such authority, it erred.

2. It is possible that the court of appeals resolved the issue of the admissibility of respondent's other-supervisor evidence because it concluded that, under the correct legal standards, it would be an abuse of discretion for the district court to exclude it. If so, however, the court failed to explain adequately why that would be so.

In deeming the evidence relevant and not subject to exclusion under Rule 403, the court of appeals did not focus on the particular testimony that respondent's proffered witnesses would have given. Instead, the court deemed the evidence relevant and not subject to exclusion under Rule 403 simply because the other-supervisor witnesses were terminated in the same RIF within a year of respondent's termination, were in the group protected by the ADEA, and were subject to similar termination procedures. Pet. App. 9a-10a. In the court of appeals' view, when those considerations are present,

other-supervisor evidence is sufficiently indicative of a policy or atmosphere of discrimination to be relevant to the intent of plaintiff's supervisor, and sufficiently probative of that intent not to be subject to exclusion based on the considerations in Rule 403. *Id.* at 9a-10a, 14a-15a.

Whether or not the court of appeals' approach amounts to a rule of per se admissibility in cases involving a company-wide RIF, as the dissenting judge suggested, Pet. App. 20a, it is not consistent with the standards of admissibility in Rules 401 and 403, and the role of the trial courts as the "primary arbiters of admissibility" (Pet. App. 23a) in considering proffered evidence. While the factors emphasized by the court of appeals are relevant to the analysis under Rules 401 and 403, they do not exhaust the relevant considerations. As previously discussed, other-supervisor evidence can be evidence of a pattern or practice of discrimination that is relevant to the plaintiff's supervisor's intent when it indicates that age discrimination is the employer's standard operating procedure or when it indicates that supervisors in the company or the geographic area or business unit in which the plaintiff's supervisor works view age discrimination as an acceptable option that will be tolerated by the employer. But whether other-supervisor evidence can be probative of either of those inferences depends on the nature of the testimony at issue. Some other-supervisor testimony that falls into the broad category identified by the court of appeals would be sufficient to establish relevance under one of those theories, some would not, and some would require a judgment call by the district court. The court of appeals therefore erred in deeming the evidence relevant simply because it fell into the broad category it identified.

The court of appeals similarly erred in conducting its de novo Rule 403 inquiry without the benefit of any trial court findings or discussion on the matter. Some other-supervisor testimony that falls within the court of appeals' broad category would be so probative that it would not likely be subject to exclusion based on Rule 403 considerations, some would have such marginal probative value that it likely should be excluded, and some would require a judgment call by the district court.

In addition, in considering the likelihood of unfair prejudice, jury confusion, or undue delay, the district court occupies a superior position to gauge the impact of the introduction of the proffered evidence vis-à-vis the other evidence in the case or appropriate trial considerations. This case, for example, has an extensive record and, even without the proffered testimony, resulted in an eight-day trial. The more extensive the record or complicated the case, the better position the district court will occupy to make judgment calls concerning the applicability of the Rule 403 factors and how to weigh those factors.

Thus, the court of appeals either incorrectly believed that it had authority to determine admissibility itself, or it incorrectly believed that it would always be an abuse of discretion to exclude other-supervisor evidence falling into the broad category it identified. Either way, the court erred. Having correctly determined that the district court applied an incorrect legal standard in excluding the evidence, the court of appeals should have remanded the case to the district court for a determination of admissibility under the correct legal standards.

The better course for this Court is likewise to send this case back to the district court to make the requisite evidentiary determinations in the first instance, apply-

ing the legal principles articulated by this Court. Since this Court does not owe any deference to the *court of appeals*' de novo Rule 401 and 403 determinations, affirming or reversing those determinations on the merits would require this Court to engage in its own de novo review of the proffered evidence and the record as a whole to consider the potential impact on the trial of the admission of that evidence. This Court does not customarily perform such a classic trial-court function and there is no particular reason to take on that task here.

CONCLUSION

The judgment of the court of appeals should be affirmed in part and reversed in part and the case remanded for further proceedings.

Respectfully submitted.

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APPENDIX

1. Rule 401 of the Federal Rules of Evidence provides:

Definition of "Relevant Evidence"

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

2. Rule 403 of the Federal Rules of Evidence provides:

Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.